

FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In re:

NAZI ERA CASES AGAINST GERMAN
DEFENDANTS LITIGATION

MDL No. 1337

D.N.J. Lead Civ. No.
98-4104 (WGB)

This Matter Relates To:

Ronald Mandowsky et al.,

Plaintiffs,

v.

Dresdner Bank AG,

Defendant.

Civ. No. 00-4986 (WGB)

O P I N I O N

APPEARANCES:

Paul E. Kerson, Esq.
LEAVITT, KERSON & DUANE
99 Park Avenue, Suite 800
New York, NY 10016

Counsel for Plaintiffs

William M. Barron, Esq.
ALSTON & BIRD LLP
99 Park Avenue
New York, NY 10016-1387

Thomas R. Valen, Esq.
GIBBONS, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE, P.C.
One Riverfront Plaza
Newark, New Jersey 07102-5497

Counsel for Defendant

BASSLER, SENIOR DISTRICT JUDGE:

Plaintiffs Ronald Mandowsky and Seth Feldman (collectively as "Plaintiffs") move to set aside their December 19, 2000 Stipulation of Dismissal with Prejudice. Plaintiffs brought this action for compensation for property allegedly confiscated by defendant Dresdner Bank Aktiengesellschaft ("Dresdner Bank") as an agent of Nazi Germany. The property was located in what was formerly East Germany.

I. BACKGROUND

A. The Nacher Family Claims

Plaintiffs are the grandnephews and great-grandnephews of Ferdinand Nacher and Ignatz Nacher, respectively. Plaintiffs, as the heirs of Ferdinand and Ignatz, purport to be the rightful owners of property stolen by Dresdner Bank from their great-uncle Ignatz and now demand restitution. In 1934, Dresdner Bank, as affiliated with Nazi Germany, allegedly seized at gunpoint the majority stock certificates in Engelhardt Breweries from Ignatz Nacher, President of Engelhardt. (See Kerson Affidavit Ex. I, Original Complaint at ¶ 6; Ferdinand Nacher Affidavit (attached to Plaintiffs' Reply Memorandum) at ¶ 1.) Ignatz developed Engelhardt from its humble beginnings into a major brewery. (See William Barron Declaration, Ex. 3, Translation of the January 8,

1993 Berlin Court Decision at 3.)¹ After stealing his stock holdings, the Nazis deported Ignatz to Switzerland where he died in 1939. (Ferdinand Nacher Affidavit at ¶ 2; Kerson Affidavit Ex. A, May 25, 2004 International Organization for Migration Decision ("IOM Decision") at ¶ 3.) Soon thereafter, Ferdinand Nacher, Ignatz's nephew and vice-president of Englehardt, fled to Belgium. (Id. at ¶ 5.) Ferdinand made his way to the United States, served in the Army from 1943-1945 and became a citizen. (Id.) In 1956, Ferdinand was appointed Executor of Ignatz Nacher's estate. (Kerson Affidavit Ex. I, Original Complaint at ¶ 4.) From that date, Ferdinand pursued claims to Ignatz's stolen property in the courts of Germany and the United States. (Id.)

Ferdinand, represented by counsel at the time, settled a portion of the claims to the Nacher family property with Dresdner Bank in a West Berlin Court in 1956. (Plaintiffs' Reply Br. at 3; William Barron Declaration, Ex. 5, Translation of the December 18, 1956 Settlement Agreement at 21.) The 1956 settlement agreement provided that "all claims of . . . the Ignatz Nacher estate, on the one hand, and the Dresdner Bank . . ., on the other hand, are settled. Thus, not only are the principal claims settled, but also any entitlements to compensation and subsidiary

¹ Dresdner Bank submitted the William Barron Declaration as part of its original Motion to Dismiss on October 6, 2000.

claims that might somehow arise." (William Barron Declaration, Ex. 5, Translation of the December 18, 1956 Settlement Agreement at 5.)

Notwithstanding the 1956 settlement agreement, in 1990 Ferdinand Nacher filed a petition for restitution against Dresdner Bank in the Berlin District Court. The Berlin Court declared that the 1956 settlement "materialized effectively," and contrary to Ferdinand Nacher's allegations of deceit, the hearing "was not infringed upon." (William Barron Declaration, Ex. 3, Translation of the January 8, 1993 Berlin Court Decision at 19, 21.) The Court observed:

Insofar as [Ferdinand Nacher as the third party petitioner] lays claims to the purchase prices for the interests transferred, as well as the company properties transferred and the vehicle fleet . . . , it should be noted that his right as executor goes no further than that of the decedent [Ignatz Nacher]. [Ignatz Nacher] was owner of neither the Engelhardt-Brauerei AG nor the Groterjahn-Brauerei AG and the land and fleets belonging thereto, nor the other breweries set forth in the demand As a major stockholder of a corporation and as its chairman of the supervisory board he could steer the purchase and sale of breweries and real estate. But the profits from the sales didn't accrue to him, but rather the company represented by him. The profits came to him only through dividends. It operates the same for [Ferdinand Nacher as the third party petitioner] and the heirs represented by him with respect to the Engelhardt-Brauerei shares reimbursed to them in the settlement. He/they are not entitled to claims against the company for reasons of business politics.

A cancellation of the basis of a transaction, which could have the consequence that the settlement would have to adapt to the new conditions, did not take place. The possessions of the Engelhardt-Brauerei did not abruptly increase through the reunification of Germany. The third party petitioner himself doesn't state that parcels of land of the Engelhardt-Brauerei AG were dispossessed in East Berlin.

(Id. at 25.)

On January 8, 1993, the Court denied Ferdinand Nacher's claims for restitution "insofar as they overstep[ped] the settlements arrived at on December 18, 1954." (Id. at 2.)

On April 13, 1994, Ferdinand filed a complaint against Dresdner Bank, as a foreign bank authorized to do business in New York, in the Supreme Court of New York demanding damages of \$25 billion (\$25,000,000,000.00). (Kerson Affidavit Ex. I, Original Complaint at ¶¶ 2, 4.) Ferdinand Nacher died in November 1996, naming his grandnephews, Plaintiffs, to continue in his place as co-executors of his estate. (Kerson Affidavit Ex. G, Last Will and Testament of Ferdinand Nacher at ¶¶ 3, 6.)

On August 15, 2000, Dresdner Bank removed the lawsuit to the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. §§ 1331 and 1441. Dresdner Bank argued that the case became removable when the Governments of the United States and the Federal Republic of Germany entered into an Executive Agreement on July 17, 2000, pursuant to which Germany and German Industry created a Foundation, discussed *infra*,

entitled "Remembrance, Responsibility and the Future" (the "Foundation"). (See Reply Declaration of William Barron, Ex. A, Dresdner Bank's Notice of Removal at ¶¶ 6, 7.)² Specifically, Dresdner Bank averred that the Executive Agreement enmeshed the Plaintiffs' claims with a substantial question of federal law. (Id. at ¶¶ 8-10.) The suit was then transferred here by order of the Multidistrict Litigation Panel and consolidated amongst approximately fifty similar cases "so that the Court could consider the impact of the German Foundation 'Remembrance Responsibility and the Future'" on the many civil suits being pursued in U.S. courts by Holocaust victims. In re Nazi Era Cases Against German Defendants Litigation, 213 F. Supp. 2d 439, 442 (D.N.J. 2002); see Multidistrict Litigation Panel Transfer Order, Docket No. 1337, 2000 U.S. Dist. LEXIS 11650 (August 4, 2000).

B. The Creation of the Foundation

The Foundation, examined at length in In re Nazi Era Cases Against German Defendants Litigation, was the result of an international effort led by Germany, the United States, and Israel to efficiently resolve the highly sensitive and numerous "claims for restitution and compensation arising out of the Holocaust." See 198 F.R.D. at 431-35 (internal citations

² Submitted as part of Defendant's Reply to its Motion to Dismiss, see supra note 1.

omitted). As part of the extensive and historic negotiations that took place, it was agreed that in exchange for the creation of a 10 billion Deutsche Mark fund supporting the Foundation by the German Government and German industries, id. at 432-33, plaintiffs with pending lawsuits in the United States "promised dismissal with prejudice of all Holocaust-related litigation against German defendants pending in American courts (referred to as 'legal peace' by the parties). . . ." 213 F. Supp. 2d at 443; see also 198 F.R.D. at 430. The Foundation promised to provide Holocaust-era victims, or their heirs, with a "non-bureaucratic [and] non-adversarial" alternative means for recovery. 198 F.R.D. at 433.

On August 12, 2000, Germany promulgated the law creating the Foundation as a legal entity with the purpose of "respond[ing] to the moral responsibility of German business arising from the use of forced laborers and from damage to property caused by persecution, and from all other wrongs suffered during the National Socialist era and World War II." (Kerson Affidavit, Exhibit E, Executive Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America concerning the Foundation, "Remembrance, Responsibility and the Future" at 2); id. at 432. The newly formed Foundation law provided that "[e]ligible claimants [would be] either those who personally were victims, or the heirs of

victims who died after February 16, 1999." Id. at 433 (citing *Gesetz Zur Errichtung Einer Stiftung "Erinnerung; Verantwortung und Zukunft"* Translated as "Law of the Creation of a Foundation 'Remembrance, Responsibility and Future'" at § 13). Those eligible would be entitled to different amounts of recovery depending on the harm they or their family members endured. Id.

Overwhelmingly, the plaintiffs in U.S. courts sought voluntary dismissal with prejudice, examined in the Court's December 5, 2000 opinion, to pursue their claims with the Foundation.

C. Dismissal of Plaintiffs' Claims in the United States and the Subsequent Decisions by the Foundation

On October 10, 2000, Dresdner Bank filed a motion to dismiss Plaintiffs' complaint based on, *inter alia*, the political question doctrine, comity and the doctrine of *res judicata*. Plaintiffs responded on October 25, 2000 with a cross-motion to remand the suit to the New York state courts. Plaintiffs argued that "[they] were especially careful not to state any federal questions whatsoever in the initial State Court Summons and Complaint [because] Plaintiffs fully anticipated that [Dresdner Bank] would wrongfully enlist the United States Government on its side." (Plaintiffs' Memorandum of Law in Support of Their Motion for Remand to the State Court and in Opposition to Defendant's Motion to Dismiss at 22.) They urged the Court to ignore the 1993 Berlin Court decision and deny Dresdner Bank's motion to

dismiss.

The Court held oral argument on November 13, 2000. On December 19, 2000, prior to the Court reaching its decision on the parties' cross-motions, Plaintiffs voluntarily dismissed this action and pursued their claims via the newly established Foundation.³ Plaintiffs presented their claims for Ignatz Nacher's stolen shares of Engelhardt Breweries to the International Organization for Migration ("IOM"), one of several partner organizations to the Foundation handling "actual collection and processing of applications, and the distribution of payments."⁴ 198 F.R.D. at 433 & n.12. The IOM twice rejected

³ In March 2002, Plaintiffs and other similarly situated parties, filed a Motion to Enforce Settlement and for Declaratory Relief. "In the most general terms, Plaintiffs allege[d] that German Industry [had] failed to meet its obligations to make appropriate interest payments to the Foundation. Accordingly, Plaintiffs . . . asked the Court to interpret the parties' rights and obligations under the German Foundation law, and . . . asked the Court to order German Industry to make additional payments to the Foundation . . . pursuant to Fed. R. Civ. P. 60(b)." 213 F. Supp. 2d at 442. On July 23, 2002, the Court denied their motion because "[it] did not retain jurisdiction to enforce settlement in [the] disputes . . . [and because] the narrow post-dismissal avenue of relief left open pursuant to Rule 60(b) [did] not give the Court the authority to issue the declaratory orders that Plaintiffs [sought]." Id. at 447-48. The Court noted that "it will not entertain any independent actions directed to the conduct of the Foundation . . . the Court is absolutely certain that matters pertaining to the operation of the Foundation are beyond the purview of American courts, and must be resolved via existing mechanisms in Germany." Id. at 447 n.11 (emphasis added).

⁴ Paragraph 6 of Annex A to the Executive Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America concerning the

Plaintiffs' claims. (Kerson Affidavit at ¶ 2.) In its first decision, on May 25, 2004, the IOM determined that the relationships between the Ignatz Nacher and the persons bringing the claims did not meet the Foundation's eligibility criteria.⁵

Foundation, "Remembrance, Responsibility and the Future," provides:

The Foundation legislation will provide that persons who suffered loss of or damage to property during the National Socialist era as a result of racial persecution directly caused by German companies are eligible to recover under the payment system set forth in paragraph 11.

Paragraph 11 of Annex A provides:

The Foundation legislation will establish a three-member committee for property matters (paragraph 6 and 7) . . . The Committee will not have the authority to reopen any case that has been finally decided by a German court or administrative body, or that could have been decided by application in time.

⁵ The International Migration Organization provided the following definition under Eligibility:

According to Section 13(1) of the German Foundation Act and Section 3(1) of the Supplemental Rules, a claim may be made by the individual who suffered the property loss. If the individual is no longer alive, the surviving spouse and children are entitled to equal shares of the award. If the eligible person left neither a spouse nor children, awards may be applied for in equal shares by the grandchildren, or if there are no grandchildren living, by the siblings. If none of the above files a claim, then a claim may be filed by the persons named as heirs in the sufferer's will; those who are heirs according to national law or based on a court

(See Kerson Affidavit, Exhibit A, May 25, 2004 IOM Decision at

3.) The IOM further provided:

A. The German Foundation Act was enacted to compensate, among other things, property losses that were caused in connection with the essential, direct, and harm-causing participation of a German enterprise. It was not created to give a second opportunity to those who could and/or should have participated in prior German compensation programs Those who were eligible to participate in one of those programs are specifically excluded by the German Foundation Act from receiving compensation under the current program, regardless of whether or not they did make a claim.

The Claimant has or had his/her domicile or permanent residence in the Federal Republic of Germany or in a country whose government has had diplomatic relations with the Federal Republic of Germany. Therefore, the Claimant could have already filed a claim in one of the prior German compensation programs.

The Commission must therefore deny the Claim for compensation for the property loss(es) referenced above.

B. The Claimant did not submit documentation indicating that the property loss(es) . . . was/were caused in connection with the essential, direct, and harm-causing participation of a German enterprise.

. . . .

Although the Claimant alleges in the Claim File that the property loss(es) referenced above was/were suffered with the

decision (but not according to a will) are not eligible.

(Kerson Affidavit, Exhibit A, May 25, 2004 International Organization for Migration Decision at 3.)

essential, direct and harm-causing participation of a German enterprise, there is no proof whatsoever of German enterprise involvement. The Commission finds that despite the application of a relaxed standard of proof, and in light of the time and place of loss and the nature of the property that was lost, the Claimant has not credibly demonstrated that the property loss(es) referenced above was/were caused in connection with the essential, direct and harm-causing participation of a German enterprise. The Commission must therefore deny the Claim for compensation for the loss(es)

(Id. at 4-5 (internal citations omitted).)

On August 24, 2004, Plaintiffs filed a Request for Reconsideration challenging the eligibility requirements and for manifest error. (See Kerson Affidavit, Exhibit B, July 18, 2005 IOM Decision at 1, 3.) Plaintiffs argued "that the loss inflicted occurred due to a major role played directly by a German company, namely Dresdner Bank and . . . no compensation has neither been paid to date nor could have been paid for the loss." (Id. at 3.) On July 18, 2005, the IOM affirmed its initial decision. (Id.)

D. Revival of Plaintiffs' Claims in this Court

Plaintiffs reappear in this Court to set aside their December 19, 2000 Stipulation of Dismissal with Prejudice pursuant to Fed. R. Civ. P. 60(b). The motion is premised upon the Court's concern, expressed in In re Nazi Era Cases Against German Defendants Litigation, 198 F.R.D. 429 (D.N.J. 2000), that the Plaintiffs in the consolidated cases could have been left

with no avenue for relief absent sufficient funding of the foundation established to provide compensation to the surviving victims of Nazi-era offenses. Id. at 446-47. Plaintiffs ask that this Court "vacate the IOM decision as it applies to the Nacher Family, and . . . set a firm date for the trial" and "to set aside the IOM's erroneous findings." (Kerson Affidavit at ¶ 19; Mandowsky Affidavit at ¶¶ 7, 9.)

II. DISCUSSION

Rule 60(b) empowers courts to relieve a party from final judgment for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . .; (3) fraud . . ., misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b).

The Third Circuit held in Coltec Industries, Inc. v. Hobgood, that "[t]he general purpose of Rule 60(b) . . . is to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice must be done." 280 F.3d 262, 271 (3d Cir. 2002) (citing Boughner v. Sec'y of Health, Educ. & Welfare, 572 F.2d 976, 977 (3d Cir. 1978)). Relief pursuant to Rule 60(b) is available to the movant

"only under such circumstances that the 'overriding interest in the finality and repose of judgments may properly be overcome.'" Harris v. Martin, 834 F.2d 361, 364 (3d Cir. 1987) (quoting Martinez-McBean v. Gov't of the Virgin Islands, 562 F.2d 908, 913 (3d Cir. 1977)). "The remedy provided by Rule 60(b) is extraordinary, and only special circumstances may justify granting relief under it." Tischio v. Bontex, Inc., 16 F. Supp. 2d 511, 533 (D.N.J. 1998) (quoting Moonlenaar v. Government of the Virgin Islands, 822 F.2d 1342, 1346 (3d Cir. 1987)). Accordingly, "[m]otions under Rule 60(b) may not generally substitute for an appeal." Harris, 834 F.2d at 364 (quoting Marshall v. Bd. of Ed. Bergenfield, NJ, 575 F.2d 417, 424 (3d Cir. 1978)). Rule 60(b) is not a vehicle to revisit an unsatisfying ruling, it "may only be granted under extraordinary circumstances where, without such relief, an extreme and unexpected hardship would occur." Sawka v. Healtheast, Inc., 989 F.2d 138, 140 (3d Cir. 1993). "[W]hen, as in this case, the [movants] made a free, calculated and deliberate choice to submit to an agreed upon decree rather than seek a more favorable litigated judgment, their burden under Rule 60(b) is perhaps even more formidable than had they litigated and lost." United States Steel Corp. v. Fraternal Asso. of Steel Haulers, 601 F.2d 1269, 1274 (3d Cir. 1979).

Plaintiffs' motion must be denied for three reasons: (1)

Rule 60(b) is not designed to release a litigant of a freely chosen litigation strategy, (2) Rule 60(b) is not available when granting relief would ultimately prove futile, and (3) for broader public interests.

A. Plaintiffs Exercised Their Free, Calculated, and Deliberate Choice to Voluntarily Dismiss With Prejudice

Seeking restoration of their cause of action under Rule 60(b)(6), Plaintiffs maintain that "[t]he clear intention [of the Foundation] was to provide a mechanism for awarding compensation to the Nacher Family. That was, is and remains a primary goal of the Governments of the United States and Germany that set up the Foundation to begin with." (Plaintiffs' Reply Memorandum at 2-3.) Plaintiffs contend that the Foundation failed because it did not recompense the Nacher family and, therefore, their voluntary dismissal "must be found to be involuntary in all respects [and it] must be vacated." (Id. at 7, 13.)

In In re Nazi Era Cases Against German Defendants Litigation, the Court explicitly stated its concern "that full funding of the Foundation might never be achieved . . . and for [that] reason all of the Orders of Dismissal (with the consent of the parties) were made expressly subject to Federal Rule of Civil Procedure 60(b)." 198 F.R.D. at 447-48 (emphasis added). Contrary to Plaintiffs' belief, the revival of their voluntarily dismissed action pursuant to the Court's Rule 60(b) power is not triggered by their inability to obtain relief through the

Foundation. Rather, the possibility of relitigating this matter became moot once the Foundation became fully operational in June 2001. See 213 F. Supp. 2d at 445-46. "There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." Ackermann v. United States, 340 U.S. 193, 198 (1950); Coltec, 280 F.2d at 275 ("even if [plaintiff's] decision to settle was improvident in hindsight, the decision has been made and cannot be revisited.").

Plaintiffs' single and unsupported allegation that their dismissal was not voluntary because "Mr. Mandowsky was subject to pressure by Prof. Burt Neuborne" is not enough to establish an extraordinary circumstance resulting in unexpected hardship. (Plaintiffs' Reply Memorandum at 8; see also Kerson Affidavit Ex. J, Neuborne Memorandum.) Professor Neuborne advised Plaintiff Mandowsky on pursuing claims with the Foundation with the consent of Mandowsky's counsel. (Id.) Recognizing the "discretionary administrative proceedings dealing with East German real estate that [Plaintiff Mandowsky] [had] already commenced," Professor Neuborne explained his belief that this Court would dismiss this lawsuit on the basis of the 1950's release even as to the East German properties. (Id.) He wrote, "[i]nvoluntary dismissal in an American court on the merits on the basis of the 1950's release might injure the ability to process claims in Germany. I do not know what the consequence of a foreign dismissal based on

a release would be on the discretionary German administrative proceedings - but it certainly can't be good. Nor do I know how the Foundation would treat a claim that had been judicially found by an American court to have been released. My guess is that the claim would be rejected." (Id.) Professor Newborne warned Plaintiff Mandowsky that "[w]ith all its uncertainties and flaws . . . [Plaintiff] had a better chance to recover in the Foundation than in an American court . . . though, that [he] did not know . . . what effect the 1950's release might have." (Id.)

Furthermore, there is no indication that Professor Neuborne's purported assurances were binding on the Foundation. In fact, the lone memorandum submitted by Plaintiffs in support of this allegation, indicates that Professor Newborne told Plaintiff Mandowsky that "[he] had no expertise concerning [Plaintiffs'] case," that "[his] primary loyalty [was] to the German Foundation," and that "as a trustee of the Foundation, [he] was personally committed to assuring fair treatment for property claimants like [Plaintiff], but that no guarantees were possible." (Kerson Affidavit Ex. J, Neuborne Memorandum (emphasis added).)

Plaintiff Mandowsky's reliance on Professor Neuborne's advice does not translate into the kind of grave consequences contemplated under Rule 60(b)(6). See Klapprott v. United States, 335 U.S. 601 (1949); Liljeberg v. Health Servs.

Acquisition Corp., 486 U.S. 847, 864 (1988) ("[Rule 60(b)(6)] should only be applied in 'extraordinary circumstances.'"); id. at 873 (Rehnquist, C.J., dissenting) ("This very strict interpretation of Rule 60(b) is essential if the finality of judgments is to be preserved."). As this Court explained, the Plaintiffs litigating their cases in the United States "were given a choice. They could either voluntarily dismiss their claims with prejudice, and file claims for compensation with the German Foundation, or they could continue to pursue litigation." 213 F. Supp. 2d at 443-44. Moreover, Plaintiff Mandowsky is a sophisticated party, represented by both domestic and German counsel.

Based on the record, his reliance on the advice of Professor Neuborne appears facially sound, and cannot now be used to undermine an evenhanded settlement. The denial of relief by a foreign tribunal cannot serve as a basis for rescinding the decision to dismiss.

B. The Relief Sought By Plaintiffs Would Ultimately Prove Futile

Dresdner Bank correctly argues that reopening Plaintiffs' voluntarily dismissed action would be a futile exercise. Although the Third Circuit has not conclusively ruled on the issue, it is well-established in other Circuit Courts of Appeals that a Rule 60(b) movant "must show a 'meritorious' claim or defense." 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶

60.24[2] (3d ed. 2006); see also Lasky v. Continental Products Corp., 804 F.2d 250, 256 & n.10 (3d Cir. 1986) (in dicta, citing to Moore's Federal Practice regarding other "'relevant factors and propositions,' that the district court may consider in exercising its discretion on a Rule 60(b) motion" including "whether there is merit in the defense or claim," but noting that those factors were not applicable in Lasky); see, e.g., Lepkowski v. United States Dept. of Treasury, 804 F.2d 1310, 1314 (D.C. Cir. 1986) ("motions for relief under Rule 60(b) are not to be granted unless the movant can demonstrate a meritorious claim or defense"); cf. Local 59 v. Superline Transp. Co., 953 F.2d 17, 21 (1st Cir. 1992) ("while a movant, in order to set aside a judgment, need not establish that it possesses an ironclad claim or defense which will guarantee success at trial, it must establish a potential meritorious claim or defense which, if proven, will bring success").

Plaintiffs who have pursued their Holocaust-related claims within the United States courts have faced ineluctable motions to dismiss and for summary judgment based on, *inter alia*, the political question doctrine and international comity. 213 F. Supp. 2d at 444 (noting that Plaintiffs who "opted against the Foundation and continued to pursue relief through litigation . . . would be confronted by defendants' motions to dismiss supported by the United States' Statement of Interest, advocating dismissal

'on any valid legal ground'"); see e.g., Sampson v. Fed. Republic of Germany & Claims Conf., 250 F.3d 1145 (2d Cir. 2001) (affirming dismissal against Germany based on sovereign immunity); Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1236 n.12 (11th Cir. 2004) (affirming dismissal based on international comity but disagreeing with this Court's holding in Frumkin v. JA Jones, Inc. (In re Nazi Era Cases Against German Defendants Litigation) and finding that "[a]lthough the executive's statement of interest is entitled to deference, it does not make the litigation non-justiciable"); Whiteman v. Dorotheum GmbH & Co KG, 431 F.3d 57, 71-72 n.16 (2d Cir. 2005) (disagreeing with the 11th Circuit's reasoning in Ungaro-Benages and expressing its view that the political question doctrine might apply in a factually similar case involving the Republic of Austria); Wortham v. Karstadtquelle AG, No. 04-2848 (3d Cir. Oct. 20, 2005) (per curiam) (affirming this Court's dismissal of the complaint for lack of personal jurisdiction); Frumkin v. JA Jones, Inc. (In re Nazi Era Cases Against German Defendants Litigation), 129 F. Supp. 2d 370, 372, 373 n.4 (D.N.J. 2001) (dismissing forced labor suit on the grounds that claims presented nonjusticiable political questions, and in the interest of international comity); Gross v. German Found. Indus. Initiative (In re Nazi Era Cases Against German Defendants Litigation), 320 F. Supp. 2d 235 (D.N.J. 2004) (dismissing suit

concerning settlement interest obligations because the claims were nonjusticiable as a result of the political question doctrine); Rozenkeir v. Schering AG (In re Nazi Era Cases Against German Defendants Litigation), 334 F. Supp. 2d 690 (D.N.J. 2004) (dismissing medical experimentation suit on the ground of nonjusticiability), appeal docketed, No. 04-3934 (3d Cir. Oct. 13, 2004).

If this Court were to grant Plaintiffs' requested relief, it would be faced with Dresdner Bank's motion to dismiss pending at the time of Plaintiffs' Stipulation of Dismissal.⁶ See 213 F.

⁶ Since Plaintiffs request the Court to vacate the IOM's decision and return this case to the Court's trial calendar, the Court assumes Plaintiffs have abandoned their cross-motion to remand this suit to the New York state courts. Dresdner Bank's motion presented the following grounds for dismissal:

1. Political Question and Comity. This case is not justiciable because it presents political questions which no United States court may decide. This Court should also abstain from adjudicating this case under principles of comity. . . .

2. Settlement/Accord and Satisfaction/Release. The claim asserted was conclusively settled years ago in 1956 and was released in the 1956 Settlement.

3. Res Judicata. The action is barred by *res judicata* because: (A) the 1956 Settlement was expressly confirmed by the Berlin court in which the Estate had asserted its claim, (B) after the reunification of Germany, the Estate pursued a claim again in Berlin to avoid the 1956 Settlement and that claim was dismissed by a judgment of the Berlin court in 1993, and (C) *the claim has now been*

Supp. 2d at 451 (citing Shaffer v. Gte N., 284 F.3d 500, 503 (3d Cir. 2002)). The Court would have to consider the impact of the 1956 settlement agreement, the Berlin Court's dismissal, and the denial of claims by the Foundation.

1. This Case Presents a Nonjusticiable Political Question

Plaintiffs demur to Dresdner Bank's view that this lawsuit is a foregone conclusion. (See Plaintiffs' Reply Memorandum at 9-12; Plaintiffs' Oct. 25, 2000 Memorandum of Law in Support of Their Motion for Remand and in Opposition to Defendant's Motion to Dismiss at 25-36.) Their insistence that Dresdner Bank is frustrating "the clear intention of the U.S. Deputy Treasury Secretary . . . to compensate the Nacher Family," (see Plaintiffs' Reply Memorandum at 10), however, does not take this case out of the realm of issues already covered by Frumkin v. Jones (In re Nazi Era Cases Against German Defendants Litigation), in which this Court agreed with two similar cases, Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248, 267 (D.N.J. 1999) and Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J.

rejected twice by the Foundation in Germany.

4. Statute of Limitations and Laches. Even if, *arguendo*, the claim had not been settled and released in 1956, the claim was long ago barred by the applicable statute of limitations and the doctrine of laches. (Dresdner Bank's Memorandum in Opposition at 12) (emphasis in original.)

1999), "that the claims of individual plaintiffs against private German defendants were no longer properly justiciable in American courts." 129 F. Supp. 2d at 378. Although Burger-Fischer, Iwanowa, and Frumkin concerned allegations of slave labor rather than property claims, those conclusions ring no less true here.⁷ "For almost 60 years now, U.S. courts have held consistently that the political question doctrine made Holocaust-era claims nonjusticiable." Gross, 320 F. Supp. 2d at 253 (D.N.J. 2004).

Moreover, the United States submitted a Statement of Interest "taking no position on the merits of the underlying claims or arguments" but urging dismissal of this case. (See Statement of Interest at 2; February 10, 2006 Dept. of Justice Letter to Court confirming "that the Statement of Interest of the United States filed on October 23, 2000 in the MDL proceeding is still considered part of the record in this individual action.") The Statement of Interest provides:

The President of the United States has concluded that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the Nazi era and World War II, including without limitation those relating to compensation for slave and forced

⁷ To be sure, the Foundation provides an avenue for relief for property claims. As the United States notes in its Statement of Interest that "[i]ndividuals who had property 'aryanized' or otherwise stolen or damaged by German companies . . . are eligible to receive payments." (Statement of Interest at 9.)

labor, "aryanization" or other confiscation of, damage to, or loss of property (including banking assets and insurance policies) . . . Accordingly, the United States believes that all asserted claims should be pursued through the Foundation instead of the courts.

(Id. at 14-15.)

Any conclusion other than that the situation presented implicates the political question doctrine would run afoul of this Court's previous ruling in Frumkin and under Supreme Court precedent.⁸ See 129 F. Supp. 2d at 382-83. Although the Circuit Courts of Appeals have reached differing conclusions on the impact of the government's Statement of Interest,⁹ regardless of

⁸ The political question doctrine dictates that a court refuse to adjudicate a claim upon which there is

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962).

⁹ As previously noted, the Eleventh Circuit that the Government's Statement of Interest alone does not render a case nonjusticiable, providing:

[T]he plain text of the Foundation

how this issue ultimately unfolds in the Third Circuit, Plaintiffs' case still presents concerns under international comity.

2. This Case Raises International Comity Concerns

International comity is "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under protection of its laws." Hilton v. Guyot, 159 U.S. 113, 163-64 (1895); see also Stonington Partners v. Lernout & Houspie Speech Prods. N.V., 310

Agreement anticipates that federal courts will consider claims against German corporations [T]he Agreement itself provides that it does not provide an independent legal basis for dismissal. Thus, the executive opted not to settle these claims or to transfer the claims to the Foundation, although it had the power to do so.

As a result, federal court consideration of the present case does not reflect a lack of respect for the executive nor does it interfere with American foreign relations. The United States is in full compliance with the Foundation Agreement so long as it files a statement of interest to courts urging respect for the Foundation as the exclusive forum to resolve these claims A statement of national interest alone, however, does not take the present litigation outside of the competence of the judiciary.

Ungaro-Benages, 379 F.3d at 1235-36 (citation and footnote omitted) (also cited in Judge Straub's dissent in Whiteman, 431 F.3d at 62 (Straub, J., dissenting)); but see Whiteman, 431 F.3d at 71-72 n. 16.

F.3d 118, 126 (3d Cir. 2002); Frumkin, 129 F. Supp. 2d at 386.

There is perhaps no case more deserving of the "practice, convenience, and expediency" of international comity than one in which the decisive issues have been consistently and competently resolved by foreign courts. See Somportex, Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971). "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves." Oetjen v. Central Leather Co., 246 U.S. 297, 303 (1918) (citing Underhill v. Hernandez, 168 U.S. 250, 252 (1897)); 129 F. Supp. 2d at 388.

"[A] court may, within its discretion, deny comity to a foreign judicial act if it finds that the extension of comity 'would be contrary or prejudicial to the interest of the' United States." Philadelphia Gear Corp. v. Philadelphia Gear, S.A., 44 F.3d 187, 191 (3d Cir. 1994); 129 F. Supp. 2d at 387. "Additionally, a court must evaluate whether a true conflict exists between the law of the United States and that of a foreign jurisdiction." 129 F. Supp. 2d at 387 (citing Hartford Fire Ins. Co. v. California, 509 U.S. 764, 798 (1993)).

Plaintiffs ask this Court to "vacate the IOM decision," to

ignore the Berlin Court's 1993 decision, and with regard to the 1956 settlement, to rule that "East German assets . . . were not included in the . . . agreement" because "West Germany had no jurisdiction or competence over claims in East Germany." (Kerson Affidavit at ¶ 19; Plaintiffs' Reply Memorandum in Support of Remand and in Opposition to Defendant's Motion to Dismiss at 5; Plaintiffs' November 16, 2000 Letter to This Court Regarding Oral Argument; Plaintiffs' Reply Memorandum in Support of Remand and in Opposition to Defendant's Motion to Dismiss at 5.) The principles of international comity, however, would compel this Court to refrain from considering the merits of Plaintiffs' allegations. The United States' Statement of Interest expresses the government's view that this lawsuit would interfere with the ultimate success of the Foundation. (See Statement of Interest at 2.) "The United States government has consistently supported the Foundation as the exclusive forum for the resolution of litigation against German corporations related to their acts during the National Socialist era." Ungaro-Benages, 379 F.3d at 1239. Since the government has announced that the German government and its administrative instrumentalities is best suited to deal with "the twin concerns of justice and urgency," (Statement of Interest at 2), underlying these claims, and since the German courts and the Foundation through the IOM have decided the issues openly and fairly, were this Court to sit in quasi-

appellate review of those decisions it would violate the quintessential standards of international comity. It is impossible to both support the operation of the Foundation and enter a judgment in Plaintiffs' favor; therefore, in keeping with its opinion in Frumkin, this Court would likely abstain under the doctrine of international comity. See 129 F. Supp. 2d at 386-88.

C. Public Policy Interests Weigh In Favor of Denying Plaintiffs' Motion

The Third Circuit recognizes a strong public policy favoring settlements of disputes, the finality of judgments and the termination of litigation.¹⁰ See American Iron & Steel Institute v. Environmental Protection Agency, 560 F.2d 589 (3d Cir. 1977); Pennwalt Corp. v. Plough, Inc., 676 F.2d 77, 80 (3d Cir. 1982); Lasky, 804 F.2d at 256 & n.10 (3d Cir. 1986); Bank of America National Trust and Savings Assoc. v. Hotel Rittenhouse Assocs., 800 F.2d 339, 344 (3d Cir. 1986); Eckersley v. WGAL TV Inc., 831 F.2d 1204, 1209 (3d Cir. 1987); Keystone Shipping Co. v. Home Ins. Co., 840 F.2d 181, 184 (3d Cir. 1988); State of New Jersey

¹⁰ "Unlike typical international agreements, the Agreement between the Governments of the Federal Republic of Germany and the United States of America concerning the Foundation 'Remembrance, Responsibility and the Future' is not a government-to-government claims settlement agreement. Rather than extinguishing the legal claims of its nationals or anyone else, the United States merely helped facilitate an agreement between victims, German Industry, and the German Government. By acting in this manner, the United States' goal was to bring expeditious justice to the widest possible population of survivors, and to help facilitate legal peace." 198 F.R.D. at 434.

Department of Environmental Protection v. Gloucester Environmental Management Services, Inc., 668 F. Supp. 404, 407 (D.N.J. 1987); Johnston Dev. Group, Inc. v. Carpenters Local Union No. 1578, 728 F. Supp. 1142, 1148 (D.N.J. 1990).

"Voluntary settlement of civil controversies is in high judicial favor. Judges and lawyers alike strive assiduously to promote amicable adjustments of matters in dispute, as for the most wholesome of reasons they certainly should." Pennwalt, 676 F.2d at 80. Indeed, "[p]ublic policy dictates that there be an end to litigation; that those who have contested an issue shall be bound by the result of the contest . . . [There is] no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be therefore concluded by the judgment of the tribunal to which he has submitted his cause." Baldwin v. Iowa State Traveling Men's Asso., 283 U.S. 522, 526 (1931).

Plaintiffs essentially argue that they should not be bound by their settlement with Dresdner Bank or by the consistent conclusions of the other tribunals that have heard and denied their claims. But allowing Plaintiffs to come back to this Court and challenge the IOM's decision after voluntarily dismissing their lawsuit would undermine the "legal peace" that resulted in the Foundation's creation and it would open the proverbial

floodgates to relitigation of similar claims. The fact that Plaintiffs voluntarily dismissed their suit to avail themselves of an alternative forum, of which they actively took part in, solidifies this Court's conclusion that Plaintiffs got what they bargained for - an opportunity to present their claims with the Foundation.

III. CONCLUSION

For the reasons set forth above, Plaintiffs' motion is **denied**.

An appropriate Order follows.

/s/ William G. Bassler
WILLIAM G. BASSLER, U.S.S.D.J.

Dated: July 5, 2006